A **MALAYSIA LAND PROPERTIES SDN BHD & ANOR**

v.

SIMESILK SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
NALLINI PATHMANATHAN J
[CIVIL APPEAL NO: R3-12B-672-2011]
20 MARCH 2014

C ***CONTRACT:*** *Service contract - Services rendered, claim for - Second appellant ('property management agent') provided services for service and maintenance of building pursuant to agreement by developer - Whether property management agent carried out works as property manager pursuant to s. 2 of Valuers, Appraisers Estate Agents Act 1981 ('VAEA')*
D *- Whether property management agent had to be registered under s. 21 VAEA prior to undertaking scope of work on behalf of developer - Whether Strata Titles Act 1985 afforded provision for developers to appoint property management agents to collect service charges on its behalf - Whether property management agent performed obligations as contracted*
E *- Whether billing should be based on 'unit basis' - Whether property management agent entitled for payments*

CIVIL PROCEDURE: *Appeal - Memorandum of appeal - Whether owner of condominium unit's complaints expressly pleaded in*
F *memorandum of appeal - Whether developer and property management agent had opportunity to rebut allegations - Objection to admissibility of evidence by owner of condominium unit - Whether too late to object - Whether Sessions Court Judge erred in dismissing claim*

Pursuant to an agreement known as the Building Management &
G Maintenance Agreement dated 21 November 2003, the first appellant ('P1') appointed the second appellant ('P2') to manage and provide services in respect of Plaza Damas shop office building and its common areas. As the manager, P2 was also responsible for the enforcement of the terms of the Deed of
H Mutual Covenant ('DMC'), in terms of the collection of monies payable to P1 by the unit owners, as well as for the accounting records in relation to the service and maintenance of Plaza Damas. The respondent was the owner of a unit in Plaza Damas. The appellants' cause of action against the respondent was based on
I a Sale and Purchase Contract ('SPA') and a DMC executed between P1 and the respondent. The appellants' complaint was

that the respondent failed to pay the maintenance fees and service charges levied by P2 against the respondent for services provided by P2. On the contrary, the respondent contended that P1 had failed to provide the services it was obliged to provide under the SPA and the DMC and accordingly refused to make payments for services it had not received. Further, the respondent contended that it had not entered into any contract with P2 or received any notice of assignments of rights or novation from the appellants and that P2 was not a registered property management agent and was therefore not authorised to make any demands against the respondent. The Sessions Court Judge ('SCJ') concluded that the appellants had failed to prove their claim on a balance of probabilities and dismissed the appellants' claim with costs. On appeal, the appellants contended that the respondent, in their pleadings, had failed to particularise the alleged breaches of the appellants. As such, the appellants argued that they were taken by surprise at trial and were not accorded an opportunity to rebut the various breaches as alleged by the respondents. The appellants further argued that it was incumbent upon the respondent to state whether such breaches was a fundamental breach warranting the termination of the contract or whether it was merely a breach of warranty/condition that entitled the respondent to a claim in damages for such breaches. The appellants therefore contended that as the respondent had failed to elect to either terminate the contract for fundamental breach or to continue with the contract and seek damages, the SPA and DMC continued to remain in force and the respondent was therefore bound to make payment as claimed for by the appellants. However, when the evidence to establish the fact that the services had not been provided were put forth by the respondent to the appellants during trial, the appellants had failed to object to such evidence. These arguments had also not been expressly set out in the memorandum of appeal but the appellant however maintained that it was an issue of law. The appellants further maintained that it was not necessary to turn to the Valuers, Appraisers and Estate Agents Act 1981 ('VAEA') as the relevant legislation was the Strata Titles Act 1985. The SCJ also made an express finding that the appellants had failed to bill the respondent on the basis of a 'unit share', but had instead utilised the basis of 'square feet' which was not in compliance with the express terms of the DMC and/or SPA. The issues that arose for determination, *inter alia*, were (i) whether the

A B C D E F G H I

A SCJ erred both in fact and in law by finding that P2 was carrying out works as a property manager pursuant to s. 2 of the VAEA; and (ii) whether a property manager had to be registered under s. 21 VAEA prior to undertaking the scope of work on behalf of a developer.

B

Held (dismissing appeal with costs):

(1) The evidence pertaining to the breach on the part of P1 for failure to provide the requisite services had become part of the total material on which the SCJ decided the case. The
C respondent pleaded that P1 had breached its obligation to provide the requisite services and had produced evidence of such breach at trial which the appellant had failed to object. It could not be said that the appellants were taken by surprise. (paras 12 & 13)

D

(2) The respondent conceded that the SPA and DMC remained fully effective and in force but was essentially stating in terms of law that there had been no consideration for the sums of money sought by the appellants and thus the respondent was
E not going to make payment. There was no merit in the appellants' contention that the respondent had failed to elect to terminate or to continue with the contract. Further, the finding of the SCJ, that P2's work scope fell within the purview of s. 2 of the VAEA was entirely correct in that P2
F was the building and/or property manager of Plaza Damas as borne out by the agreement between P1 and P2. (paras 14, 16 & 19)

(3) The Strata Titles Act 1985 afforded no provision for a
G developer to utilise its subsidiary and appoint an agent to collect services charges on its behalf. The lack of an express prohibition in the Act did not mean that P2 was therefore entitled to do so. The SCJ did not err in coming to her conclusions on P2 *albeit* in fact or in law. There was no reason
H therefore to alter or reverse her findings in this regard. In other words, it appeared that a property manager as utilised or envisaged in the Strata Titles Act 1985 meant property manager as defined in the VAEA. As such, P2 needed to be licensed to collect service charges for services rendered as a
I property manager. In the absence of such a licence it could not make claim for such charges. (para 23)

(4) The respondent entered into the SPA and DMC with P1 and had never authorised or consented to an assignment of P1's rights and responsibilities to P2. Therefore, all claims for outstanding monies ought to be made by P1 and not P2. As there was no privity between P2 and the respondent, it was an added reason that the respondent was not obligated to make payment to P2 in respect of invoices rendered by it. (para 24)

(5) The appellants' own witness admitted that the service charges had been computed on this erroneous basis and therefore it followed that the computation of service charges was wholly incorrect. It was not tenable to interpolate and utilise 'square feet' instead of 'share units'. As such, the SCJ could not be faulted for relying on the clear admission of an error in concluding that the appellants had failed to make out the claim on a balance of probabilities. A consideration of the appeal record showed that the SCJ had fully considered the various issues put before her and concluded correctly that the appellants' claim should fail. (paras 27 & 28)

Case(s) referred to:

Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors [2004] 1 CLJ 781 CA ***(refd)***

Carol Christopher Pelly v. Puspa Muniandy [2012] 1 LNS 442 HC ***(refd)***

Lee Ming Chong Sdn Bhd v. Prudential Properties Sdn Bhd [2011] 1 LNS 1322 HC ***(refd)***

Superintendent of Lands and Surveys (4th Division) & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

The Government of Sarawak v. Sami Mousawi Utama Sdn Bhd [2000] 7 CLJ 228 HC ***(refd)***

Legislation referred to:

Valuers, Appraisers and Estate Agent Act 1981, ss. 2, 19(c), 21(1)(aa), (2), 23(1), 30

Valuers, Appraisers and Estate Agents Rules 1986, r. 25B(1), (3), 49

For the appellant - KW Chang Stanley (Siti Fairuz Md Ali with him); M/s Stanley Chang & Partners

For the respondent - FT Yip (Adora Yusof with him); M/s Yip & Co

[Appeal from Sessions Court; Summons No: 52-35592-2010]

Reported by Sandra Gabriel

JUDGMENT

Nallini Pathmanathan J:

[1] This is an appeal against the decision of the learned Sessions Court Judge dismissing the appellants' claim against the respondent for outstanding maintenance and service charges in the sum of RM37,188.82. This appeal arises after a full trial in the court below on two days, where the appellants called three witnesses and the respondent, one.

[2] Prior to the hearing of this appeal the following interlocutory matters were filed and disposed of in relation to this appeal:

(a) The respondent's application to strike out the appeal, on the grounds that the notice of appeal erroneously stipulated that the respondent was the appellant, when the former had not filed any appeal. This application was dismissed.

(b) The appellants' application to amend the notice of appeal to rectify the foregoing error. The application was allowed with costs.

(c) The appellants' application for an extension of time to lodge the security deposit of RM250. The application was dismissed, and on appeal to the Court of Appeal, allowed with costs and remitted to the High Court.

(d) The appellants' filed an application to adduce fresh evidence in the appeal before this court, which I refused with costs.

(e) The appellants then filed an application for a stay of the hearing of the appeal pending their appeal to the Court of Appeal against my refusal to allow the fresh evidence to be adduced for the purposes of this appeal. I refused the application for a stay. This is primarily because the hearing of this appeal has already been considerably delayed, having been filed in 2011. A further stay would lead to considerable and in my view, unnecessary delay. In any event if the appellants succeed in this appeal, the lack of the fresh evidence would not have affected the outcome of the appeal. On the other hand, if they do not succeed, then it would be open to the appellants to have both the application to adduce fresh evidence and the appeal proper to be heard together. In all these circumstances therefore I refused a stay of the hearing of the appeal.

Salient Background Facts

[3] The first appellant ('P1') is a developer that constructed a mixed commercial development known as Plaza Damas. Plaza Damas comprises commercial shoplots, office lots and apartments with strata titles all falling within the purview of the Strata Titles Act 1985.

[4] The second appellant ('P2') is a wholly owned subsidiary of P1 and was appointed as a property development manager to manage Plaza Damas, by P1. In essence therefore P1 appointed P2 to collect all maintenance and service charges and to manage the common property in Plaza Damas.

[5] The respondent is the owner of a unit in Plaza Damas.

[6] The appellants' cause of action against the respondent is based on contract, more particularly arising from a sale and purchase contract dated 16 March 1999 ('SPA') and a deed of mutual covenants also dated 16 March 1999 executed between P1 and the respondent only. In essence the appellants' complaint is that the respondent failed to pay the maintenance fees and service charges levied by P2 against the respondent for services provided by P2. It should be noted that there is no contract, *albeit* oral or written between P2 and the respondent.

[7] The respondent in its defence raised a number of defences, including:

(i) P1 had failed to provide the services it had undertaken or was obliged to provide under the SPA and/or deed of mutual covenants. Accordingly the respondent refused to make payments for services it had not received and denied owing these monies to P1;

(ii) The respondent had never agreed or consented to any assignment or novation of the obligations under the SPA and/or the Deed of Mutual Covenants ('DOMC') to the appellants. In this context, the respondent maintained that it had not entered into any contract with P2 or received any notice of assignment of rights or novation from the appellants.

(iii) P2 is not a registered property management agent under the relevant legislation and is therefore not authorised or empowered to make any demands against the respondent for alleged services, which in any event, it denies receiving.

[8] The learned Sessions Court Judge, having heard the three witnesses for the appellants and the single witness for the respondent, concluded that the appellants had failed to prove their claim on a balance of probabilities and dismissed the claim with costs. In her grounds of judgment, the learned judge found, *inter alia*, as follows:

(i) P2 was not a registered property management agent under the Valuers, Appraisers and Estate Agent Act 1981. In this context consideration was accorded to s. 19(c) of the said Act which requires that a registered valuer or appraiser undertake the work of property management. Property management is defined in s. 2 and includes the management and control of any land, building and any interest in either, on behalf of the owner for a fee. The definition goes on to set out a list of responsibilities which is not exhaustive. Section 2 also defines a property manager as a person, firm or a company who on behalf of the owner of any land, building and any interest in either, manages and controls such land or building or interest in either to maintain or increase the investment in or physical worth of, such property.

(ii) The learned judge in this context considered the evidence of SP1 and SP2 and concluded that P2 had undertaken work that falls within the definition of 'property management'. However having regard to s. 21 of the Valuers Appraisers and Estate Agents Act 1981, the learned judge concluded that P2 could not act as a property manager as it did not possess the requisite licence or registration to do so, as provided under the said section. The learned judge found that none of the appellants' witnesses responded to this pleaded issue. No documents were produced to establish P2's locus to collect maintenance charges etc as a property manager on behalf of P1. As such the learned judge concluded that P2 could not undertake this work on behalf of P1 as it was not registered as a property manager in accordance with the provisions of the Act. The learned judge relied on the penal sanctions available against those who undertook such work.

(iii) The learned Sessions Court Judge also relied on the case of *The Government of Sarawak v. Sami Mousawi Utama Sdn Bhd* [2000] 7 CLJ 228. In that case *Sami Mousawi Utama Sdn Bhd* was a company that was not registered as an architects'

firm, engineering firm or quantity surveying firm. They sought to recover professional charges from the Government of Sarawak and this was allowed by an arbitrator. On appeal the High Court set aside the decision of the arbitrator on the grounds that the respondent there was not registered with the requisite professional body, *albeit* as an architect, engineer or quantity surveyor and this was an offence under the relevant legislation. In other words the respondent there could not recover his fees. The decision was upheld on appeal. Although this case referred to architects and engineers, the learned Sessions Court Judge was of the view that the principle enunciated there was applicable as against P2, who, she found, was bound by the provisions of the said Valuers, Appraisers and Estate Agents' Act 1981. In view of the penal sanctions provided therein, coupled with P2's failure to provide any evidence of registration, she concluded that P2's claim against the respondent failed on this ground.

(iv) The learned Sessions Court Judge then went on to consider the second main limb of the respondents' defence, namely that P1 had failed to provide the services it was obliged to provide, and had utilised the common property for its own benefit and interests. It should be noted that at trial, no objection whatsoever was taken to this defence. The learned Sessions Court Judge noted that the respondent, in its defence had pleaded that P1 failed to provide the requisite services it was bound to. Through SD1, the learned judge found that the respondent established that P1 had utilised the common property that was originally a vacant piece of land with trees etc, was utilised to construct buildings and a showroom for P1 known as 'Regalia'. However this was undertaken without the permission of the owners of the units in the development. SD1 provided a litany of complaints in this regard, including the building of toilets on the common property which was subsequently halted by reason of a lack of approval from DBKL. This was admitted by the appellants' witnesses.

(v) The learned judge also considered SD1's evidence that he had sought from the plaintiff a statement of account to ascertain how the appellants computed the sum sought from the unit owners. More particularly SD1 wanted to ascertain how the appellants dealt with the costs of maintenance of

Regalia that had been built solely for P1's use as well as all the other buildings that had been erected for P1's own purposes. No such statement of account however was forthcoming from the appellants.

(vi) The learned judge touched on the evidence of SP2 who testified that the appellants had provided services such as cutting grass. However Plaza Damas does not have grass that requires cutting. As such the respondent maintained that charges were being levied for services that had not been provided. The respondent, through SD1 also produced photographs evidencing the respondent's complaints, the totality of which is enumerated in the learned judge's judgment. These matters comprise findings of fact. It is again pertinent that no objection whatsoever was taken to these exhibits, nor to the questions put to the appellants' various witnesses in this regard.

(vii) The learned judge also noted a further complaint namely that the carpark had been sold to a company that was inter-related to P1, namely one Target Term Sdn Bhd. As a consequence of this sale, the unit owners were bound to pay considerably higher car park charges than the original cost.

(viii) Finally the learned judge agreed with the respondent's contention that the quantum charged by the appellants in respect of service charges was incorrect. This is because the SPA specifically provides for charges to be computed on the basis of 'share units'. However SP3 testified that the respondent was being charged in accordance with 'square feet'. SP3 also conceded that the respondent had never been advised of the number of share units assigned to his unit.

(ix) The learned judge accepted the respondent's contentions above and concluded that the appellants had failed to respond to the respondent's valid claims *vide* its letter as to how the monies paid by the unit owners was being utilised and whether P1 itself paid charges for unsold units. The learned judge also concluded that P1 had abused the common property by building a showroom for its own use without making the requisite charges that were instead levied on the unit owners. This was clear from the failure of the

appellants to adduce an evidence of such payment. On these grounds the learned judge concluded that the appellants had failed to make out its claim against the respondent and dismissed the claim with costs.

The Appeal Before This Court

[9] The first issue taken by learned counsel for the appellants was the point that the respondents' pleadings were defective, more particularly in relation to the contention that the appellants had failed to provide the requisite services for the charges levied. In this context, the court was asked to peruse the defence filed, more particularly the plea that in contravention of the SPA and DOMC there had been no provision of services as contracted for in those documents. The appellants complaint was that the respondent had failed to particularise the breaches. As such it was argued that the appellants were taken by surprise at the trial and were not accorded an opportunity to rebut the various breaches detailed by the respondent. It was contended, at some length, that if indeed these breaches had been specifically pleaded and particularised, then the respondent would have responded to each and every complaint.

[10] Two issues arise for consideration here. This specific grievance or complaint by the appellants is not raised expressly in the memorandum of appeal. There is merely a general plea that the learned judge erred in taking into account facts that were not pleaded. It appears to this court that such a plea if sought to be argued at length at this stage, ought to have been expressly pleaded in the memorandum of appeal. A general plea is insufficient.

[11] Secondly and/or alternatively, it appears to this court that this ground does not succeed because it is clear from a perusal of the record of appeal, more particularly the notes of proceedings that no objection whatsoever was taken by counsel in the course of trial when this evidence was being adduced. In fact when these specific complaints were put to the plaintiffs' witnesses, no objection was taken. Neither was any objection taken when SD1 gave oral evidence of these complaints. Finally no objections were taken when documentary evidence in the form of photographs were produced by the respondent to establish the fact that the services had not been provided. In the face of this abject silence, it appears to this court to be somewhat late in the day to object to this preponderance of evidence in the respondent's failure.

[12] The system of law practised in this country is the adversarial system. It is expected of counsel in the course of trial to object to evidence which is felt is taking a litigant by surprise. In any event this would be instantly apparent from a perusal of the pleadings. In the instant case, the respondent has pleaded with clarity in its defence that the services P1 was obliged to provide were not pleaded. The appellants did not apply for further and better particulars. Neither did they object at trial to the evidence produced at trial in support of this plea of a breach on the part of P1 by its failure to provide the requisite services. In these circumstances I am unable to agree with the contention of learned counsel for the appellants, which I understand to be that this court should now strike out or refuse to consider the entirety of this evidence adduced in the court below. It seems to this court that this is an untenable proposition. In short, it is too late in the day for the appellants to raise this objection. The evidence pertaining to the breach on the part of P1 in failing to provide the requisite services as testified by SD1 has become part of the total material on which the learned Sessions Court Judge decided the case. (See *Bumiputra-Commerce Bank Bhd, Kuala Terengganu v. Chendering Development Sdn Bhd & Ors* [2004] 1 CLJ 781; [2004] 1 MLJ 657). In S*uperintendent of Lands and Surveys (4th Division) & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185, Peh Swee Chin SCJ, held as follows:

> The underlying well known rationale for requiring such material facts to be pleaded is, of course, to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts, for such evidence, if allowed, will prejudice and embarrass or mislead the opposing party.
>
> If a party is taken by surprise, he must object then and there at the point of time when such evidence emerges, for such evidence to be disregarded by the court, and then the court will uphold such timely objection. The court will generally however, grant an adjournment if requested, on suitable terms as to costs, etc, for the pleading to be amended by the party seeking to adduce such evidence. One must bear in mind the need for an orderly adversary system of a court trial, not a chaotic harangue in a market place.
>
> A party is not taken by surprise when the circumstances actually indicate so, eg when such evidence is the very evidence sought to be relied on him from the outset, or when he fails to object to such evidence then and there as this court now seeks to emphasize.

[13] In the instant case, the respondent pleaded that P1 had breached its obligation to provide the requisite services. At trial, the respondent produced evidence of such breach. It cannot be said that the appellants were taken by surprise. In any event, they failed to object. This ground therefore fails.

[14] The second issue canvassed to this court was that as the respondent contended that the appellants had breached their contractual obligations, it was incumbent upon the respondent to state whether such breach was a fundamental breach warranting the termination of the contract, more particularly the DOMC, or whether it was merely a breach of warranty/condition that entitled the respondent to a claim in damages for such breach. The law pertaining to fundamental breach as compared to a breach of a warranty or term of a contract was relied upon. The appellants then pointed out that the respondent had failed to indicate *albeit* in writing or orally that they intended to terminate the DOMC for fundamental breach. The respondent had continued to take receipt of the invoices issued by P2 without so indicating. Neither did the respondent specify that the breaches comprised a breach of warranty, entitling them to seek damages from the appellants. The appellants therefore contend that as the respondent has failed to elect to either terminate the contract for fundamental breach or to continue with the contract and seek damages, the SPA and DOMC continue to remain in force and the respondent is therefore bound to make payment as claimed for by the appellants.

[15] This second argument has also not been expressly set out in the memorandum of appeal. Learned counsel for the appellant however maintained that it was an issue of law. I am unable to agree with learned counsel for the appellant that this comprises the basis for a reversal of the decision of the learned Sessions Court Judge because it appears to be flawed.

[16] The simple fact of the matter is that the respondent is essentially stating in terms of law that there has been no consideration for the sums of money sought by the appellants and that therefore it, ie, the respondent is not going to make payment. In other words, the respondent maintains that it has not received any or sufficient services and therefore will not pay for it. There the respondent concedes that the SPA and DOMC remain fully effective and in force. However the respondent simply refuses to

pay monies for something which it has not received. Again I fail to see the merit, if any, in the appellants' contention in respect of this ground of appeal, and it too must fail.

[17] Thirdly the appellants contend that the learned Sessions Court Judge erred when she made a finding both of fact and in law that P2:

(a) Was carrying out works as a property manager; and

(b) It was restricted from so doing, because it is not registered as a property manager under the Valuers, Appraisers Estate Agents Act 1981 ('VAEA').

[18] A reading of the transcript of the notes of proceedings discloses that SP2 had described P2's work scope which comprised service and maintenance works. He described the work undertaken by P2. This amounted to property management work. This was further affirmed by SP1 who testified that pursuant to an agreement known as the Building Management & Maintenance Agreement of 21 November 2003, P1 appointed P2 to manage and provide services in respect of Plaza Damas shop office building and its common areas. As the manager, P2 was also responsible for the enforcement of the terms of the DOMC, in terms of the collection of monies payable to P1 by the unit owners, as well as for the accounting records in relation to the service and maintenance of Plaza Damas.

[19] The finding of the learned Sessions Court Judge, namely that P2's work scope fell fairly within the purview of s. 2 of the VAEA is therefore, with respect, correct. In other words the learned Sessions Court Judge was entirely correct in finding that P2 is the building and/or property manager of Plaza Damas as borne out by the said agreement between P1 and P2.

[20] The learned Sessions Court Judge then relied on s. 21 of the VAEA where it specifically provides that unless one is registered with the relevant board under the VAEA, that entity or person cannot act as a property manager and carry out works that fall within the definition of property management as well as collect fees for the services rendered.

Was the learned Sessions Court Judge wrong in so concluding, namely that a property manager needs to be registered under the VAEA prior to undertaking this scope of work on behalf of a developer of a development? This issue was considered in *Lee Ming Chong Sdn Bhd v. Prudential Properties Sdn Bhd* [2011] 1 LNS 1322; [2012] 8 MLJ 1 by Lee Swee Seng, JC (now judge). The learned judge in that case considered the effect of s. 21(1)(aa) of the VAEA. In that case the court had the benefit of the evidence of a witness from the Board of Valuers, Appraisers and Estate Agents Malaysia who confirmed the Board's letter that an entity could not collect service charges without a license under r. 49 of the Valuers, Appraisers and Estate Agents Rules 1986 read together with r. 25B(1) and (3). This witness had been authorised by the Board to give evidence. She further testified that the exception to s. 21(1)(aa) is provided under s. 21(2) where the owner of any land, building and any interest therein who manages such land, building and interest is exempted.

[21] The learned judge went on to consider the issue of who may provide the services of a property manager and collect fees and charges for the services rendered. He also relied on s. 23(1) of the Act. The section provides as follows:

> No registered valuer, appraiser or estate agent shall practise valuation, appraisal or estate agency or have the right to recover in any court any fee, charge or remuneration for any professional advice or services rendered by him pursuant to his practice unless he practises as a sole proprietor of a sole proprietorship, a partner of a partnership, a shareholder or director of a body corporate registered with the Board, or as an employee of such sole proprietorship, partnership or body corporate.

[22] He concluded that the entity or company in his case was not licensed to provide such a service under the Act. In like manner it would appear that P2 does not also fall within the purview of s. 23 above. I would respectfully adopt the reasoning of Lee Swee Seng, J in the foregoing case to conclude that P2 is not licensed to take on the role of property manager as it has no licence as required under the VAEA.

[23] The appellants maintain that it is not necessary to turn to the VAEA as the relevant legislation is the Strata Titles Act 1985. But that Act too affords no provision for a developer to utilise its subsidiary and appoint it as agent to collect services charges on its behalf. The lack of an express prohibition in the Act does not

mean that P2 is therefore entitled to do so. In this context it would appear to the court that the learned Sessions Court Judge did not err in coming to her conclusions on P2 *albeit* in fact or in law. There is no reason therefore to alter or reverse her findings in this regard. In other words, it appears to this court that property manager as utilised or envisaged in the Strata Titles Act means property manager as defined in the VAEA. As such P2 needs to be licensed to collect services charges for services rendered as a property manager. In the absence of such a licence it cannot make claim for such charges (see *Carol Christopher Pelly v. Puspa Muniandy* [2012] 1 LNS 442; [2012] MLJU 576 where the court held that it was an offence to carry out property management as provided for under s. 30 of the VAEA unless the person is licensed and registered under the said Act.

[24] In this context it is pertinent to note that there is no privity between P2 and the respondent. The nexus or privity is between P1 and P2. This is added reason why the respondent is not obligated to make payment to P2 in respect of invoices rendered by it. I concur with learned counsel for the respondent that the respondent had never authorised or consented to an assignment of P1's rights and responsibilities to P2.

[25] It also appears to the court that as the respondent entered into the SPA and DOMC with P1, all claims for outstanding monies ought to be made by P1 and not P2. And this too is answered by the finding of the learned Sessions Court Judge that the appellants failed to prove that Plaza Damas had been properly maintained.

[26] The fourth ground put forward by the appellants is that the learned Sessions Court Judge erred in relying on the case of *The Government of Sarawak v. Sami Mousawi Utama Sdn Bhd* [2000] 7 CLJ 228. Having perused the learned Sessions Court judge's grounds, I am unable to concur with learned counsel for the appellant on this point. The learned judge expressly extrapolated from this case and sought to interpret the purpose and intention of the VAEA in arriving at the conclusion she did. This does not afford sufficient ground to disturb or reverse her findings in law.

[27] Fifthly the learned Sessions Court Judge made an express finding that the appellants had failed to bill or charge the respondent on the basis of a 'unit share', but had instead utilised

the basis of 'square feet'. This is clearly not in compliance with the express terms of the DOMC and/or SPA. The appellants' own witness, namely SP3 admitted that the service charges had been computed on this erroneous basis. Given this clear expression of error, it follows that the computation of service charges is wholly incorrect. It is not tenable to interpolate and utilise 'square feet' instead of 'share units'. The learned Sessions Court Judge cannot be faulted for relying on this clear admission of an error in concluding that the appellants had failed to make out the claim on a balance of probabilities.

[28] On the general, all encompassing ground in the memorandum of appeal relied upon by the appellants, namely that the learned Sessions Court Judge had failed to appreciate and apply the proven facts and thereby caused substantial miscarriage of justice, I am again unable to agree with learned counsel for the appellant because a consideration of the appeal record in full shows to the contrary, namely that the Sessions Court Judge has fully considered the various issues put before her and concluded correctly that the appellants claim should fail. There appears to be no reason to fault her for his and I therefore conclude that the appeal is to be dismissed with costs of RM10,000.